PP

v.

WONG HAUR WEI

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL APPEAL NO: 41-7-2002]
4 OCTOBER 2007

IMMIGRATION: *Employment - Non possession of valid pass - Foreign workers found without valid passes - Immigration Act 1956/63, s. 55B(1) - Whether accused has good defence under s. 79 of the Penal Code - Whether magistrate erred in acquitting and discharging*

This was the prosecution's appeal against the decision of the magistrate acquitting and discharging the accused of all the three charges at the close of the defence case. The three charges preferred against the accused were in relation to the employment of three male Indonesian citizens ('the foreign workers') who were found working in the accused's factory without possession of valid passes, contrary to and punishable under s. 55B(1) of the Immigration Act 1959/63. The defence of the accused was that he was not familiar with the rule and procedure in the employment of foreign workers, as they were handled by the agents. The magistrate acquitted and discharged the accused on the grounds that the accused had a good defence under s. 79 of the Penal Code as the accused was not conversant with the law and procedure in applying for valid passes for foreign workers and that the burden of proof was always on the prosecution as the accused did not have to prove that he was cheated by one Christine into believing that the foreign workers had valid passes. The public prosecutor submitted that the magistrate had erred in failing to hold that the accused bore the burden of proving the exception in s. 79. The question for determination in this appeal was whether the court was correct in the interpretation of said s. 79.

Held (allowing the appeal, setting aside the lower court's order of acquittal and discharge):

(1) The magistrate had erred in holding that for the purposes of establishing the defence under s. 79, the burden was on the prosecution to prove the case against the accused, when it is

A settled law that the burden of proof in this case was cast on the accused to prove the defence under s. 79 on a balance of probabilities. The magistrate, having arrived at a finding that the accused was not conversant with or was indeed ignorant of the law and the procedure in applying for valid passes for
B the three employees, had treated the mistake of law as a mistake of fact. Mistake of law had been expressly excluded as a defence under s. 79. The magistrate's order of acquittal and discharge could not be upheld. (paras 30, 31 & 32)

C *[A fine of RM10,000 is imposed on each charge; a total fine of RM30,000 is ordered accordingly.]*

Case(s) referred to:
Arumugam & Another v. Rex [1947] 13 MLJ 45 ***(refd)***
Lim Chin Aik v. Regina [1963] 29 MLJ 50 FJCPC ***(refd)***
D *PP v. Koo Pui Fong [1996] 2 SLR 266* ***(refd)***
PP v. Mohammed Faizal Shah [1998] 1 SLR 333 ***(refd)***
PP v. Sainal Abidin Mading [1998] 3 CLJ 41 HC ***(refd)***
PP v. Teo Eng Chan & Ors [1988] 1 CLJ 425; [1988] 2 CLJ (Rep) 793 HC ***(refd)***
E *Tan Khee Wan Iris v. PP [1995] 2 SLR 63* ***(refd)***
Thyagarajan v. PP [1987] 2 MLJ 284 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 107
Immigration Act 1959/1963, s. 55B(1)
F Penal Code, ss. 52, 79

Other source(s) referred to:
Mallal's Penal Law, p 92

For the defence - Yap Boon Hau (Mok Lay Yong with him); M/s Lee
G *Hishammuddin*
For the prosecution - Maziah Abu DPP

Reported by Suhainah Wahiduddin

H

JUDGMENT

Low Hop Bing J:

Appeal

I **[1]** This is the prosecution's appeal against the decision of the learned magistrate ("the magistrate") who had on 29 January 2002 acquitted and discharged the accused of all the three charges at the close of the defence case.

[2] The three charges preferred against the accused are in relation to the employment on 28 October 2000, in the accused's factory in Bukit Rambai Industrial Area Phase IV ("the factory") of three male Indonesian citizens *viz* Sahuri, 21 years old; Isnan Wartijo, 33 years old; and Rohadi bin Gondokusumo, 28 years old (collectively "the foreign workers") when they were not in possession of valid passes, contrary to and punishable under s. 55B(1) of the Immigration Act 1959/63 as amended in 1997 ("s. 55B(1)").

Essential Ingredients

[3] Section 55B(1) creates the offence in the following words:

> **55B. Employing a person who is not in possession of a Valid Pass**
>
> (1) Any person who employs one or more persons, other than a citizen or a holder of an Entry Permit,
>
> who is not in possession of a valid Pass shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit for each such employee.

[4] The essential ingredients of the offence are:

(1) employs a person; and

(2) that person is not in possession of a valid pass.

Employs A Person

[5] All three foreign workers testified in the magistrate's court that they were working in the factory and were paid their salary. They stayed in the accused's staff quarters. They were arrested by a team of immigration officers who raided the factory on 28 October 2000. They were subsequently charged in court. Upon pleading guilty, each of them was sentenced to six months imprisonment and fined RM2,000 or two months imprisonment in default. They have respectively served their sentences. There is no doubt that the prosecution has proved this ingredient.

A **Valid Pass**

[6] Evidence adduced at the trial revealed that none of the foreign workers employed in the factory was able to produce any valid pass. SP7 the assistant director in the Kuala Lumpur
B Immigration Head Office confirmed that his department had not issued any valid pass to the foreign workers.

[7] When Rohadi (SP1), one of the foreign workers, met the accused, he told the accused of his country of origin ie, Indonesia. The accused did not ask for SPl's passport, but had
C instead promised to obtain a valid pass for him, through an agent named Christine. SP1 had never met Christine.

[8] Sahuri (SP2) another foreign worker did not show the accused any valid pass. The accused had again promised SP2 to
D obtain it through Christine.

[9] SP3 Isnan also did not have a valid pass when he was arrested as a foreign worker in the factory.

E **[10]** The prosecution had therefore proved this ingredient.

Close Of Prosecution's Case

[11] As the two essential ingredients have been established at the close of the prosecution's case, the magistrate has correctly found
F that a *prima facie* case has been established against the accused, and the defence was called.

Defence Case

[12] In his evidence, the accused admitted that he was the
G owner of the factory and the foreign workers were his employees. His defence was that he was not familiar with the rule and procedure in the employment of foreign workers, as they were handled by the agents.

H **[13]** He added that the foreign workers were brought to the factory by Christine who was known to the accused's wife (DW2), and that Christine would charge a fee of RM250 for each foreign worker. The accused first met Christine in August 1999 in his factory and Christine explained to him that she was an agent
I who could handle matters pertaining to foreign workers. In the course of discussion, Christine gave him some documents for

recruiting foreign workers. Christine completed the particulars in the documents for that purpose. Christine signed on and affixed her company rubber stamp to those documents. After discussion, the accused agreed to take Christine as the agent and made a payment of RM1,000, for which Christine had acknowledged receipt.

[14] The accused signed the documents given by Christine purportedly as application forms for the pass, but he actually did not understand what he had signed as the forms were in Bahasa Malaysia. However Christine did explain to the accused that it was to apply for valid passes for foreign workers.

[15] Christine brought the foreign workers to work in the factory. After the team of immigration officers raided the factory, the accused attempted to locate Christine but was unsuccessful. It was only then that the accused knew that the foreign workers brought in by Christine did not have valid passes. The accused assumed that they had them. Christine was not a witness in this case.

[16] DW2 and DW3 gave evidence to the same effect as the accused's evidence on the existence of Christine and the accused's execution of the purported application forms.

[17] The magistrate acquitted and discharged the accused, on the grounds that the accused had a good defence under s. 79 of the Penal Code as the accused was not conversant with the law and procedure in applying for valid passes for foreign workers and that the burden of proof is always on the prosecution as the accused does not have to prove that he was cheated by Christine into believing that the foreign workers had valid passes.

Section 79 Penal Code

[18] Learned deputy public prosecutor Miss Maziah bt Abu submitted that the magistrate erred in failing to hold that the accused bears the burden of proving the exception in s. 79, on the strength of:

1. *Mallal's Penal Law* p 92;

2. *Arumugam & Another v. Rex* [1947] 13 MLJ 45 HC Singapore;

A 3. *Public Prosecutor v. Teo Eng Chan & Ors.* [1988] 1 CLJ 425; [1988] 2 CLJ (Rep) 793 HC Singapore;

4. *Tan Khee Wan Iris v. PP* [1995] 2 SLR 63 High Court Singapore.

B **[19]** Learned defence counsel Mr. Yap Boon Hau assisted by Miss Mok Lay Yong contended that the accused has established the defence under s. 79, in that the accused had acted under a mistake of fact that his three workers had valid passes and that he had been misled by Christine, thereby negating *mens rea* on the C part of the accused. They relied on:

1. *Lim Chin Aik v. Regina* [1963] 29 MLJ 50 JCPC;

2. *Thyagarajan v. Public Prosecutor* [1987] 2 MLJ 284 HC D Singapore;

3. *Public Prosecutor v. Koo Pui Fong* [1996] 2 SLR 266 HC Singapore;

4. *Public Prosecutor v. Mohammed Faizal Shah* [1998] 1 SLR 333 E HC Singapore; and

5. *Public Prosecutor v. Sainal Abidin Mading* [1998] 3 CLJ 41 HC.

[20] Having considered the evidence adduced at the trial, the F submissions and the magistrate's grounds of decision, I am of the view that the question for determination in this appeal is whether the court below is correct in the interpretation of s. 79.

[21] The relevant portion which provides for the defence of a mistake of fact under s. 79 merits reproduction as follows: G

> 79. Nothing is an offence which is done by any person ... who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

H **[22]** In *Lim Chin Aik, supra*, the Privy Council had not been requested to consider s. 79 of the Penal Code.

[23] Next, a careful reading of the judgment of Chua J in *Thyagarajan, supra,* revealed that s. 79 was never ventilated before I the learned judge. Similarly, in *Koo Pui Fong, supra,* s. 79 was not the bone of contention before Yong Pung How CJ (Singapore) (as he then was); nor in *Mohammed Faizal Shah, supra,* before the same learned Chief Justice of Singapore.

[24] Again, s. 79 was not raised as an issue for determination in *Sainal Abidin Mading, supra,* and hence it did not form part of the judgment of Richard Malanjum J (now CJ (Sabah & Sarawak)).

[25] It is abundantly clear that the above authorities are not of any assistance to the defence.

[26] In my view, the principles governing the defence under s. 79 may be stated as follows:

(1) The mistake must be a mistake of fact and not a mistake of law, as ignorance of the law is no excuse;

(2) The mistake of fact must be made in good faith, and the test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s. 52 of the Penal Code ie, whether there was due care and attention. The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention ie, it was a reasonable mistake to make: per Yong Pung How CJ (Singapore) (as he then was) in *Tan Khee Wan, supra.* (See also *Mallal's Penal Law,* Malayan Law Journal Sdn Bhd 2002);

(3) Where an accused is acting under the instruction of a third person, the accused must prove that he is sincerely mistaken in fact in thinking that the third person was acting *bona fide*: per Worley J in *Arumugam and Another, supra*; and

(4) Section 79 appears in Chapter IV of the Penal Code dealing with general exceptions. Under s. 107 of the Evidence Act 1950, the burden of proving the existence of circumstances bringing a case within the general exceptions in the Penal Code is upon the accused person and the court shall presume the absence of such circumstances: per Coomaraswamy J (Singapore) in *Teo Eng Chan & Ors, supra,* at p. 161C left.

[27] Significantly, by way of illustration, in *Arumugam and Another, supra,* there was evidence that the second defendant and the accused were acting under the instructions of a third person and that they were under a mistake of fact. Hence, their defence under s. 79 was sustained.

[28] However, in *Teo Eng Chan & Ors, supra,* the defence under s. 79 was rejected as none of the accused had acted in good faith ie, there was no exercise of due care and attention in committing the mistake of fact.

[29] Under s. 79, a mistake of fact in not renewing the licence to provide public entertainment failed as the accused could not show an exercise of due care and attention: see *Tan Khee Wan, supra.*

[30] Reverting to the instant appeal, I find that the magistrate has erred in holding that for the purposes of establishing the defence under s. 79, the burden is on the prosecution to prove the case against the accused, when it is settled law that the burden of proof in this case is cast on the accused to prove the defence under s. 79 on a balance of probabilities.

[31] In addition, the magistrate, having arrived at a finding that the accused was not conversant with or was indeed ignorant of the law and the procedure in applying for valid passes for the three employees, had treated the mistake of law as a mistake of fact. Mistake of law has been expressly excluded as a defence under s. 79.

Conviction

[32] In the circumstances, the magistrate's order of acquittal and discharge cannot be upheld. I therefore allow this appeal, set aside the lower court's order of acquittal and discharge and substitute it with a finding of guilty and conviction against the accused.

Sentence

[33] In mitigation, it was submitted that the accused is married and has four dependants to support, *viz.* his wife, their two children and an aged mother. His monthly income is RM5,000 and so prays for a lenient sentence.

[34] The prosecution pressed for an appropriate sentence.

[35] Section 55B(1) provides for a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit for employing each of the employees without a valid pass. The process of sentencing involves an exercise of discretion which is to be based on established judicial principles and the factual circumstances prevailing in each particular case.

[36] In this appeal, I am of the view that in the exercise of discretion in the light of the facts herein, justice is seen to be done by imposing a fine of RM10,000 on each charge, and so for three charges, the total fine is RM30,000 which I hereby order accordingly.